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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

SUSAN M. STEELE, Plaintiff and Appellant, v. BELL-CARTER FOODS, INC, ET AL., Defendants and Respondents.	A151952 (Contra Costa County Super. Ct. No. CIVMSC15-00757)

Susan Steele (Steele) cracked her tooth while eating an olive that contained a pit or pit fragment. The olive came from a can processed and distributed by Bell-Carter Foods, Inc. et al. (Bell-Carter). In the underlying personal injury action, the trial court granted Bell-Carter summary judgment, finding that a person injured by the natural part of a food item may not recover damages based on theories of strict liability or breach of warranty. (*Mexicali Rose v. Superior Court* (1992) 1 Cal.4th 617 (*Mexicali Rose*).) On appeal, Steele contends that *Mexicali Rose* should not be applied to bar her claims against Bell-Carter. We reject this contention and affirm the judgment.

I. Background

In April 2013, Steele purchased several cans of "Lindsay's Large Pitted Olives," planning to serve some at her daughter's birthday party. On the day of the party, Steele prepared appetizers in her kitchen, including a veggie platter and a bowl of olives for her grandchildren. She took an olive from the bowl on the platter, bit down on it once, and

felt her tooth crack. Then she spit out a pit from the olive, which she put into the can on the counter.

In May 2015, Steele filed a personal injury complaint against Bell-Carter, using a judicial council form to state a cause of action for products liability based on theories of strict liability, negligence, and breach of an express written warranty.

During discovery, Steele gave a deposition, where she described the olives she included in her appetizer dish as "the ones that kids put on their fingers." Steele recalled that after she bit into one of the olives and spit out the pit, she turned to her daughter and told her what happened because she had no idea that a pit would be in an olive. She stated that she cooked with olives "all the time," and had never experienced an occasion when an olive that was supposed to be pitted had a pit in it.

Bell-Carter produced evidence during discovery regarding the process of pitting and canning Lindsay Large Pitted Olives. The pitting process was described as follows: "Generally speaking, . . . whole olives are pumped to a pitter to remove pits from the olives. The pitter extracts the pit. The pits go to a different stream where they are collected to bins. The pitted olives are conveyed through flotation tanks containing salt water. Whole olives, pits or other dense objects will sink to the bottom of the floatation tanks, while the pitted fruit floats on the top." Canning occurs after pitting, as follows: "Once the pitting process is completed, the olives are then conveyed over wide mesh shakers, which remove any broken pieces and/or open pits. The pitted olives are then conveyed to a filler, and the can is filled with the olives. Weigh checks are performed to ensure that the correct amount of product is in the can. The can is then sealed, and the identifying production code is stamped on the can."

Bell-Carter also produced undisputed evidence that "[e]ach of the cans of the Lindsay Large Pitted Olives is sold with a label that states[] 'Caution, Look out for Pits!' "

In February 2016, Bell-Carter moved for summary judgment, arguing there was no evidence that Bell-Carter breached its duty of care and that Steele could not recover on theories of strict liability or breach of warranty because an olive pit is a natural part of an

olive. Opposing the motion, Steele argued that evidence Bell-Carter mischaracterized the olive that caused her injury as "pitted" supported her strict liability and breach of warranty theories. Steele conceded, however, that she could not prove Bell-Carter was negligent and expressly abandoned that theory.

After holding a hearing, the trial court granted Bell-Carter summary judgment. According to the court, under the California Supreme Court's decision in *Mexicali Rose, supra*, 1 Cal.4th 617, when an injury-causing substance is natural to a food item, the plaintiff may recover in negligence, but she is categorically barred from recovering damages based on theories of strict liability or breach of warranty.

II. Discussion

Summary judgment may be granted "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) Our standard of review is de novo. (*Ong v. Fire Ins. Exchange* (2015) 235 Cal.App.4th 901, 906.)

A. Legal Principles

" ' "Products liability is the name currently given to the area of the law involving the liability of those who supply goods or products for the use of others to purchasers, users, and bystanders for losses of various kinds resulting from so-called defects in those products." ' [Citation.] One may seek recovery in a products liability case on theories of both negligence and strict liability." (*Johnson v. United States Steel Corp*. (2015) 240 Cal.App.4th 22, 30-31 (*Johnson*).)

"The doctrine of strict liability for products was adopted to address the realities of an industrial society, where 'handicrafts have been replaced by mass production' and a consumer may not have the 'means or skill enough to investigate for himself [or herself] the soundness of a product' [citation] nor sufficient knowledge of the manufacturing process to prove negligence [citation]. Strict products liability 'insure[s] that the costs of injuries resulting from defective products are borne by the manufacturers that put such

products on the market rather than by the injured persons who are powerless to protect themselves.' " (*Johnson, supra,* 240 Cal.App.4th at p. 31.)

"Strict liability is not absolute liability. [Citation.] A manufacturer is not an insurer for all injuries that may result from the use of its product; it is liable for injuries caused by a product defect. [Citation.] As Justice Traynor observed: 'A bottling company is liable for the injury caused by a decomposing mouse found in its bottle. It is not liable for whatever harm results to the consumer's teeth from the sugar in its beverage. A knife manufacturer is not liable when the user cuts himself with one of its knives. When the injury is in no way attributable to a defect there is no basis for strict liability.' [Citation.] Strict product liability seeks to hold manufacturers (and others in the stream of commerce) accountable when there is 'something wrong' with the product." (*Johnson, supra,* 240 Cal.App.4th at p. 31, italics omitted.)

"A warranty relates to the title, character, quality, identity, or condition of the goods. The purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell." (*Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 20.) An express warranty "is a contractual promise from the seller that the goods conform to the promise." (*Daugherty v. American Honda Motor Co., Inc.* (2006) 144 Cal.App.4th 824, 830.)

"Unlike express warranties, which are basically contractual in nature, the implied warranty of merchantability arises by operation of law. [Citation.] It does not 'impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of quality.' " (*American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291, 1295-96.) To be merchantable, a good must, among other things, be "fit for the ordinary purposes for which such goods are used." (Com. Code § 2314, subd. (c).) "[I]n cases involving personal injuries resulting from defective products, the theory of strict liability in tort has virtually superseded the concept of implied warranties" because the basic elements of both theories are the same. (*Grinnell v. Charles Pfizer & Co.* (1969) 274 Cal.App.2d 424, 432.)

In cases involving food, strict liability and implied warranty theories are available to establish liability for a personal injury caused by a "foreign" substance in a food product. By contrast, if the source of the injury is a "natural" substance in the food, an injured plaintiff can pursue a claim for negligence, but " has no cause of action in strict liability or implied warranty." (*Mexicali Rose, supra*, 1 Cal.4th at p. 633.)

In *Mexicali Rose, supra*, 1 Cal.4th 617, the plaintiff was injured by a chicken bone in an enchilada served at defendant's restaurant. He sued for damages, alleging theories of negligence, breach of implied warranty and strict liability, but his case was dismissed at the pleading stage pursuant to a rule established by *Mix v. Ingersoll Candy Co.* (1936) 6 Cal.2d 674 (*Mix*). In *Mix*, an early products liability case involving a restaurant patron injured by a bone in a chicken pot pie, the Supreme Court distinguished substances that are "natural" to certain types of foods from "foreign" substances and held that "a substance causing injury that is natural to the food served can *never* lead to tort or implied warranty liability." (*Mexicali Rose* at p. 619 [emphasis added]; see *Mix, supra*, 6 Cal.2d at p. 682.)

The Supreme Court granted review in *Mexicali Rose* to reconsider the *Mix* rule. The court was persuaded by a recent trend in the courts to take account of consumers' reasonable expectations in determining whether a food product is legally defective, but it also remained committed to the legal distinction between natural and foreign substances in food products. (*Mexicali Rose, supra*, 1 Cal.4th. at p. 625-630.) Accordingly, it combined the two doctrines and announced the following principles for resolving personal injury claims caused by consumption of food: "If the injury-producing substance is natural to the preparation of the food served, it can be said that it was reasonably expected by its very nature and the food cannot be determined to be unfit for human consumption or defective. Thus, a plaintiff in such a case has no cause of action in implied warranty or strict liability. The expectations of the consumer do not, however, negate a defendant's duty to exercise reasonable care in the preparation and service of the food. Therefore, if the presence of the natural substance is due to a defendant's failure to exercise due care in the preparation of the food, an injured plaintiff may state a cause of

action in negligence. By contrast, if the substance is foreign to the food served, then a trier of fact additionally must determine whether its presence (i) could reasonably be expected by the average consumer and (ii) rendered the food unfit for human consumption or defective under the theories of the implied warranty of merchantability or strict liability." (*Id.* at pp. 630–631, fns. omitted.)

B. Steele's Strict Liability Theories

In the present case, Steele was injured by an olive pit, a natural substance, which can be reasonably expected by its very nature to be found in an olive and, therefore, the olive that injured Steele was neither unfit for human consumption nor defective. Accordingly, Steele has no cause of action in implied warranty or strict liability. (*Mexicali Rose, supra,* 1 Cal.4th at pp. 630-631.) Beyond that, Steele abandoned her negligence claim, thereby acknowledging she could not prove that the presence of the pit or pit fragment in the olive was due to Bell-Carter's failure to exercise due care.

Steele contends that *Mexicali Rose* should not be applied to bar her strict liability theories because (1) her case affords "an excellent opportunity" for the Supreme Court to revisit the issues addressed in *Mexicali Rose*; (2) the *Mexicali Rose* court limited its holdings to a "restaurateur"; and (3) a pit is not a natural substance because it is foreign to and not reasonably expected to be found in a pitted olive.

We decline the invitation to use Steele's complaint to test the continuing viability of *Mexicali Rose,* which is the controlling precedent and binding on this court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) As for Steele's other contentions, *Mexicali Rose* was limited to commercial restaurant establishments. (*Mexicali Rose, supra,* 1 Cal.4th 617, 619.) However, its reasoning was extended to retail food suppliers in *Ford v. Miller Meat Co*. (1994) 28 Cal.App.4th 1196 (*Ford*). *Ford* also highlights the flaw in Steele's conception of the distinction between foreign and natural food substances.

In *Ford,* the plaintiff damaged her tooth when she tasted ground beef that she had purchased from the defendant's market. (*Ford, supra,* 28 Cal.App.4th at p. 1199.) She sued the store for damages, alleging theories of strict product liability, breach of warranty

and negligence. Following a court trial, the court found the plaintiff failed to prove her negligence claim and that her theories of strict liability and breach of warranty did not apply. In affirming the judgment on appeal, the *Ford* court made three points that are pertinent here. First, by limiting its holding to restaurant establishments, the *Mexicali Rose* court addressed a situation in which "the patron plays no part in preparation of the food and thus has little, if any, opportunity to examine the ingredients for the presence of potentially harmful substances." (*Ford, supra*, at p. 1199.) The high court's reasoning, the *Ford* court found, has "even greater force where there has been a retail sale of meat to a consumer who herself has prepared the injurious food." (*Id*. at p. 1199.) Second, the *Ford* court emphasized that "*Mexicali Rose* departs from the foreign-natural rule only to the extent it bars a negligence claim, not to the extent it precludes actions for strict liability and breach of warranty." (*Ford* at p. 1201.) Third, the *Ford* court found that the fact that ground beef has been " 'pulverized' " does not change the character of a bone fragment in that meat, which "remains a natural substance under the foreign-natural distinction." (*Id*. at p. 1202.)

Ford's application of the *Mexicali Rose* principles reinforces our conclusions here. The fact that Steele purchased the injury-causing food and prepared it in her own home makes the reasoning of *Mexicali Rose* more rather than less persuasive. Furthermore, the distinction Steele draws between olives and pitted olives is no more probative than the *Ford* plaintiff's distinction between beef and ground beef. Bone is a natural substance in beef just as a pit is a natural substance in an olive.

In a separate argument in her appellate brief, Steele contends that summary judgment was improper because Bell-Carter can be held liable for failing to warn Steele about the presence of a pit in the pitted olives. Steele reasons that the fact that she cannot prove Bell-Carter was negligent does not preclude her from establishing liability under a strict liability failure to warn theory. As support for this argument, Steele cites a personal injury case involving exposure to asbestos. (*Saller v. Crown Cork & Seal Co., Inc*. (2010) 187 Cal.App.4th 1220, 1239-1240.) According to Steele, all she needs to show to establish liability under this theory is that Bell-Carter failed to give her an adequate

warning about the particular risk posed by pits in pitted olives. Furthermore, she posits, this theory rests on factual issues for a jury to decide, such as whether the presence of a pit posed a substantial danger, and whether the statement on the olive can label to "Look out for Pits!" was an adequate warning.

Steele's strict liability failure to warn theory is inconsistent with the governing principles outlined in *Mexicali Rose,* which preclude her from relying on *any* strict liability theory to recover damages for an injury caused by a natural substance in a food product. Steele cannot avoid this controlling precedent by mischaracterizing her failure to warn theory as a distinct ground for imposing liability on Bell-Carter.[1]

C. Steele's Express Warranty Claim

In its summary judgment ruling, the trial court did not address Steele's breach of warranty theory, except to suggest that it was also foreclosed by *Mexicali Rose*. However, *Mexicali Rose* did not involve an express warranty theory of liability, and the court did not otherwise address this theory. As noted earlier, express warranties are substantively different from implied warranties because of their contractual nature.

Steele contends that her express warranty theory is viable. She argues that Bell-Carter made an express warranty by using the word "Pitted" on the label of its can as an affirmation or promise, and as a description of its olives as not containing pits, and that Bell-Carter breached this express warranty because the olive that Steele bit into did have a pit in it.

Under section 2313, subdivision (1) of the Commercial Code, "(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise"; and "(b) Any description of the goods

[1] Bell-Carter disputes Steele's contention that the adequacy of a warning on a product label is a jury question that cannot be resolved on summary judgment. To rebut this contention, Bell-Carter requests that this court take judicial notice of a "Food Labeling Guide" published by the United States Food and Drug Administration." Because Steele's strict liability failure to warn theory fails for a different reason, Bell-Carter's motion for judicial notice is denied.

which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description." To prevail on a breach of warranty claim based on these provisions, " 'the plaintiff must prove (1) the seller's statements constitute an " 'affirmation of fact or promise' " or a " 'description of the goods' "; (2) the statement was " 'part of the basis of the bargain' "; and (3) the warranty was breached.' " (*Patricia A. Murray Dental Corp. v. Dentsply Internat., Inc*. (2018) 19 Cal.App.5th 258, 275.)

In the present case, Steele's breach of warranty theory rests on the single fact that the word "Pitted" appears on the olive can label as part of the brand name for Bell-Carter's olives. This fact does not create a triable issue regarding Bell-Carter's liability for Steele's injury. "Descriptive names constitute a warranty as to the general characteristics of the article and that it is substantially what the name represents it to be. They do not, as a rule, amount to a representation of perfection." (*Lane v. C. A. Swanson & Sons* (1955) 130 Cal.App.2d 210, 213 (*Lane*).) Moreover, representations made to the plaintiff must be considered as a whole. (*Harris v. Belton* (1968) 258 Cal.App.2d 595, 606.) Here, the undisputed evidence establishes that the olive can label that displays the brand name "Lindsay's Large Pitted Olives" also states "Caution: Look out for Pits!" When considered together, these statements foreclose Steele from establishing that the brand name "Lindsay's Large Pitted Olives" was an express warranty that there were no pits or pit fragments in any of the olives.

Steele mistakenly relies on *Lane*, *supra*, 130 Cal.App.2d 210. The *Lane* plaintiff, who was injured by a bone in a can of "boned chicken," alleged that the defendants breached a warranty that this product was " 'free from chicken bones or other foreign substances.' " (*Id*. at p. 211.) To prove this express warranty had been made to him, plaintiff relied on the can label, newspaper advertisements and his own testimony about what he believed had been promised to him. The can label was described as follows: "Upon the label were the words 'Swanson,' then in still larger letters 'Boned Chicken' and in small letters 'Ever Fresh' and beneath that in still smaller letters the word 'Brand.' The words 'Boned Chicken' are in bold type, the word 'Brand' in type so small as to be unnoticeable except on close inspection." (*Id*. at p. 212.) Plaintiff's evidence also

included a full-page newspaper advertisement, which described the defendants' " 'Boned Chicken' " as " 'All luscious white and dark meat. No bones. No Waste. Swanson chicken – finest in the land . . .' " (*Id*. at p. 212.)

In an appeal from a defense judgment, the *Lane* court found that the newspaper advertisement was incorporated into the contract of sale, and that the trial court erred by excluding plaintiff's testimony about how he interpreted the label on the can of Swanson Boned Chicken. (*Lane, supra*, 130 Cal.App.2d at pp. 215-217.) Ultimately, the *Lane* court held that "the label on the can coupled with the representation in the newspaper ads that the contents contained no bones, constituted an express warranty and that the same was breached. If there could be a doubt as to the meaning of 'boned chicken,' it was removed by the statement that it contained no bones." (*Id.* at p. 216.)

Steele posits, without analysis, that the phrase "pitted olives" in the present case "is the equivalent of the phrase 'boned chicken' " in *Lane*. In isolation, perhaps. But that is where the analogy ends. The evidence in *Lane* showed that the label on the can of boned chicken went beyond mere identification and constituted an affirmative promise—at least when considered in conjunction with defendants' advertising—that there were no bones in the chicken. Here, by contrast, the olive can label contained a statement cautioning consumers that the olives could contain pits. Furthermore, Steele did not produce any type of advertisement that could be construed as a promise or warranty that there were no pits or pit fragments in the olives. As the *Lane* court acknowledged, the use of a term in a product name is often a means of identification rather than a representation about kind or quality. (*Lane, supra*, 130 Cal.App.2d at p. 213.) We reach that conclusion here not just because there is no contrary evidence, but because the brand name appeared on a label that also contained an explicit warning to "Look out for Pits!"

IV. Disposition

The judgment is affirmed. Costs on appeal are awarded to Bell-Carter.

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Tucher, J.

We concur:

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Pollak, P.J.

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Brown, J.